

Investigative or "Weingarten" Discussions

The law (5 USC 7114(a)(2)(B)) provides that the union has the right to represent employees in meetings with management when the employee is being examined in connection with an investigation. These conversations are usually referred to as investigative or Weingarten meetings.

The name Weingarten, used in connection with investigative discussions, comes from a private sector case decided by the U. S. Supreme Court in 1975, *J. Weingarten, Inc., v. NLRB*. In its decision, the Supreme Court determined that, in situations in which an employee is being questioned by a management representative and reasonably fears that discipline may be taken, the employee is entitled to the help of a union representative if he or she asks for such assistance.

When the Federal Labor Relations Statute was written, the principles of the Supreme Court's Weingarten decision were written into law. The law establishes four requirements for a meeting to be considered an investigative meeting allowing for union representation:

- **An examination of an employee in connection with an investigation (also known as an investigatory examination).** To be an investigatory examination, the meeting must involve the questioning of an employee as part of an inquiry to ascertain facts. For example, routine work discussions or performance evaluation counseling sessions do not involve an investigation and therefore, do not meet this requirement.
- **An agency representative conducts the examination.** An agency representative includes supervisors, managers, personnel specialists, security agents, and inspectors general.
- **The employee reasonably believes disciplinary action against him or her may result.**
- **The employee requests representation.** The union's entitlement to be present occurs only at the employee's request. If the employee does not request representation, you may hold the meeting without notifying the union. This is significantly different than the requirement in a formal discussion. In a formal discussion situation, the union has a right to be there even if the employee does not desire union presence. The union only has a right to attend an investigative meeting if the employee wants the representative there. The employee does not have a right to his/her own personal representative from the union. If the employee is dissatisfied with the representative provided by the union, he/she has the choice to accept the union's representative or have no representative during the investigative examination.

In addition to the requirements for union representation rights in the Statute, each labor agreement has an article on union representation rights. Therefore, it is critical to become familiar with the articles in your State's labor agreement which cover union representation rights. In many labor agreements, the government has negotiated what can be described as "expanded Weingarten rights." In addition to the investigative requirement of the statute, some agreements provide representation when disciplinary action is discussed or a potential disciplinary situation is discussed. This is an expansion beyond the "investigative" requirement of the statute. Furthermore, some agreements mandate that employees be notified of his/her right to be accompanied by a union representative, before the investigative meeting takes place. This requirement is greater than the annual notification requirement in the law. It is our advice that even if the notification requirement is not covered in your State's labor agreement, you should advise an employee before an investigative meeting of his/her right to have a union representative.

The union representative has a right to be an active participant in these meetings. The union representative can raise relevant questions that will help the employee tell his/her side of the story. You have the right to insist that the employee, and not his/her representative, respond to questions asked in the investigatory examination. You may cancel or terminate the examination at any time, even after the employee requests to have the exclusive representative present. If you terminate or cancel the examination, you can take action on the basis of other evidence you have gathered.